86-1248

Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JAMES CURTIS,
Petitioner,

v.

STATE OF ILLINOIS,
Respondent.

WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Was the Petitioner's right to counsel violated by the admission into evidence of testimony regarding identification of the Petitioner from a photograph of an unconstitutional lineup held without the assistance of counsel?

2. Was the Petitioner's right to counsel violated by the admission of in-court identifications which were tainted by the unconstitutional lineup identification?

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OPINIONS BELOW

The opinion of the Appellate Court of Illinois is reported as People v. Curtis, 132 Ill. App. 3d 241, 476 N.E.2d 1162 (1985), and is set forth in the Appendix at A-1. The Supreme Court of Illinois opinion is reported at 113 Ill. 2d 136, 497 N.E.2d 1004 (1986), and is set forth in the Appendix at A-41.

JURISDICTION

The decision of the Supreme Court of Illinois was rendered on June 20, 1986. A petition for rehearing was denied on September 26, 1986. A stay of mandate was ordered by the court on October 14, 1986, pending the filing of a petition for a writ of certiorari in the United States Supreme Court. The jurisdiction

of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The sixth amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The fourteenth amendment provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law[.]"

STATEMENT OF THE CASE

The incident which gave rise to this case took place on July 18, 1979, when two men robbed a liquor store in Chicago, Illinois. Four store employees were present at the time: manager Thomas Buckle, cashier Rosalind Harris, stock man Greg Webb, and part-time security guard Fred Kennie. The robbery lasted approximately fifteen minutes to a half hour. Shortly afterwards, Buckle told police that the robbers were a white man and a black man, and gave a general description of the robbers to the police.

About nineteen months later, in February 1981, Kennie told police that he had been a participant in the robbery and that his accomplices were Andrew Ryder

and James Curtis. Subsequently, on February 10, 1981, two arrays of five photographs were shown to Buckle. One array included a photograph of Ryder, and the other array included a photograph of Curtis. According to the testimony of a police officer, Buckle made a tentative identification of Ryder, but asked to see him in person before positively identifying him. In addition, Buckle stated that one photograph "resembled" Curtis, but he was not able to make a positive identification. Harris also viewed the photographs and made identifications of both Ryder and Curtis.

On February 17, 1981, felony complaints against Ryder and Curtis were prepared and submitted to a judge of the circuit court, who held a hearing and

determined that probable cause existed for filing the complaints. Thereafter, arrest warrants were issued and both Ryder and Curtis were arrested that day. At the police station at about 6:45 p.m., Curtis was given his Miranda warnings and asked if he would give a statement. He responded by saying, "No, until I see my attorney" (R-81). He attempted to call two attorneys, but could not reach either of them because no one answered the calls (R-82). He was then told: "You're going to have to be in a lineup." Curtis did not voluntarily participate; he was told that he "had to stand the lineup" (R-86). At the lineup, Buckle told police that Curtis "resembled the man."

On February 19, 1981, Harris saw a picture of both Ryder and Curtis in the

newspaper, which reported that they had been arrested for the robbery (R at 384-85, 388, 409). Several days later, police officers showed Harris photographs of the February 17 lineups and she identified Ryder and Curtis (R at 371, 376).

About two and one-half years later, more than four years after the robbery, Ryder and Curtis were tried. Prior to trial, Ryder and Curtis filed motions to suppress (A-112) and the trial judge suppressed Buckle's lineup identification of Ryder on the ground that he had not been afforded the assistance of counsel at his lineup, but Buckle's lineup identification of Curtis was not suppressed because the judge ruled that Curtis had waived his right to counsel (A-113).

At trial, over the objection of

Ryder and Curtis, the court allowed Buckle and Harris to make in-court identifications. Both defendants objected on the basis that the in-court identifications were the result of the unconstitutionally obtained lineup identifications. In addition, over objection, the prosecutor showed Harris the lineup photograph at trial, and Harris testified that she had seen the lineup photographs on February 23, 1981, and that she had identified Curtis and Ryder at that time. The lineup photographs were admitted into evidence. Kinnie provided the only other evidence regarding the participation of Curtis and Ryder in the robbery. Both Curtis and Ryder were convicted and sentenced to prison.

The Appellate Court of Illinois,

First District, reversed in a decision issued March 29, 1985. The court ruled that Ryder had been denied the sixth amendment right to counsel, and that Curtis had not waived his right. In addition, the court determined that in light of the unconstitutional lineups, the admission at trial of evidence from Buckle and Harris regarding their identifications of Curtis was error. Because the only remaining identification testimony was provided by Kinnie, whose veracity was subject to doubt because of his unfriendly relationship with Ryder and his other criminal activities, the court ruled that the admission of identification testimony from Buckle and Harris was not harmless error.

The Illinois Supreme Court reversed

the appellate court on June 20, 1986, ruling that any constitutional error regarding the lineups was harmless error. The court determined that the identification by Harris of Curtis from lineup photographs was not improper, and that the in-court identifications by Buckley and Harris were valid. Justice Goldenhersh dissented, agreeing with the Illinois Appellate Court that the uncounseled lineup tainted the photographic identification by Harris, and that the in-court identifications had not been shown to be based on independent observation.

ARGUMENT

THE ILLINOIS SUPREME COURT'S RULING WAS IN CONFLICT WITH THIS COURT'S DECISIONS REGARDING THE SIXTH AMENDMENT RIGHT TO COUNSEL AT PRETRIAL LINEUPS.

This case presents several important federal constitutional issues, which must be resolved by this Court in order that justice may be served. Several of these issues were decided by the trial court and the Illinois Supreme Court in direct conflict with guiding precedents from this Court. One primary issue, the precise extent of the per se exclusionary rule of Gilbert v. California, 388 U.S. 263 (1967), has not been directly addressed by the Court in the context presented by this case. Therefore, the acceptance of this petition would afford the Court an opportunity to clarify this

exclusionary rule with regard to the fruits of lineup identifications made in violation of the sixth amendment right to counsel, particularly with regard to photographs taken at such unconstitutional lineups.

A. The Petitioner's Right To Counsel Was Violated By The Admission Into Evidence At Trial of An Identification Made During A Lineup Held In The Absence Of The Petitioner's Attorney.

1. The Petitioner Was Entitled To The Assistance of Counsel At His Lineup

As this Court has recently stated, "[t]he right to the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments is indispensible to the fair

administration of our adversarial system of criminal justice." Maine v. Moulton, 106 S. Ct. 477, 483 (1985) (footnote omitted). Based on the "obvious truth" that the average defendant does not have the professional legal skill to protect himself, Johnson v. Zerbst, 304 U.S. 458, 462 (1938), the right to counsel safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding. Maine v. Moulton, supra, 106 S. Ct. at 484.

This Court has long recognized that the right to counsel extends not simply to assistance at trial, but also to all other "critical" stages of the proceedings against a defendant in which the results "might well settle the accused's fate and reduce the trial itself to a

mere formality." United States v. Wade, 388 U.S. 218, 224 (1967). One such critical stage at which defendants are entitled to the assistance of counsel is the pretrial lineup for purposes of identification by witnesses. Id.; Gilbert v. California, 388 U.S. 263 (1967). As this Court has emphasized, there are a number of dangers inherent in a pretrial identification conducted in the absence of counsel. Persons who conduct the identification procedure may suggest, intentionally or unintentionally, that they expect the witness to identify the accused. Such a suggestion, coming from a police officer or prosecutor, can lead a witness to make a mistaken identification. The witness then will be predisposed to adhere to this identification in

subsequent testimony at trial. United States v. Wade, supra, 388 U.S. at 229, 235-36; Moore v. Illinois, 434 U.S. 220, 224-25 (1977). Therefore, the presence of counsel at such procedures can be a valuable protection to the defendant:

> "[T]he first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself. The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness--'that's the man.'"

United States v. Wade, supra, 388 U.S. at 236.

In Kirby v. Illinois, 406 U.S. 682,

689 (1972), the Court established that an accused's sixth amendment right to counsel attaches at or after the time that adversarial judicial proceedings have been initiated against him "by way of formal charge, preliminary hearing, indictment, information, or arraignment." Subsequently, the Court found that adversarial proceedings are begun in Illinois when a complaint is filed in court. Moore v. Illinois, supra.

Although the State has contended in the proceedings in this case before the lower courts that Curtis was not entitled to the assistance of counsel at his line-up, the right of counsel was clearly triggered once the felony complaint and arrest warrant were issued against Curtis. As the Appellate Court of Illinois

noted, prosecutions in Illinois can be commenced by either a complaint, an information, or an indictment. Ill. Rev. Stat. ch. 38, § 111-1 (1983). When an arrest warrant is sought in a felony case, a felony complaint is presented by an assistant State's Attorney to a judge in the circuit court. In addition to naming the State as the plaintiff, the felony complaint names the accused as a defendant and charges that he has committed a specified felony offense. The judge must examine under oath the complainant and any witnesses presented by the assistant State's Attorney. If it appears to the judge, from his examination of the complainant and witnesses presented by the assistant State's Attorney and the contents of the complaint,

that the person charged committed an offense, the judge will approve the filing of the complaint naming the person charged as the defendant, and the judge will issue a warrant for the defendant's arrest. I.R.S. ch. 38, § 107-09. Thus, in the words of the appellate court:

> Plainly, after the complaint is filed, the person charged has ceased being merely an accused, and he has, in fact, in every respect become a formal defendant in need of an attorney to protect his interests as a citizen at any subsequent critical stage of the criminal proceedings that are brought against him by the State.

People v. Curtis, 132 Ill. App. 3d 241, 476 N.E.2d 1162, 1167 (1985). The same result has been reached in other Illinois cases. See, e.g., People v. Jumper, 113 Ill. App. 3d 346, 447 N.E.2d 531 (1983);

People v. Harrell, 104 Ill. App. 3d 138, 432 N.E.2d 1163 (1982); People v. Faulkner, 86 Ill. App. 3d 136, 407 N.E.2d 126 (1980).

Thus, it is plain from this Court's precedents and from the facts of this case that Curtis did indeed have the right to assistance of counsel at his lineup.

2. The Petitioner Did Not Waive His Right To Counsel.

The trial court erroneously ruled that Curtis had waived his right to counsel by virtue of his failure to continue to insist on having his attorney present at the lineup. As the Appellate Court of Illinois explicitly held (and as the Supreme Court of Illinois implicitly

held), however, the words and conduct of Curtis were totally inconsistent with any claim of waiver.

The facts show that Curtis was asked to make a statement after his arrest, but declined. He testified: "I told them no, until I see my attorney." It was clear that the police understood this statement as a decision not to make any statement, for a police officer testified at trial that Curtis "declined to give any statement at all." When he was asked if he wanted to call an attorney, he said, "I told them I had three attorneys, and I didn't know which one to call at that time of night, whether they'd be in the office or not" (R-81). Later, he attempted to call two of the lawyers but no one answered the phone. When Curtis

was told that he would have to participate in the lineup, he was not aware that the police could not demand that he appear at the lineup without assistance of counsel. Rather, it was made to appear as if his participation in the lineup that night, with or without counsel, was inevitable.

The trial court relied on two statements by Curtis to support its finding of a waiver. Both statements were made after Curtis had initially declined to give a statement before consulting with an attorney, and both were prompted by continued conversation by the police. After Curtis had refused to speak to one officer, that officer told him that he would have to participate in a lineup and asked him if he was going to contact an

attorney. Curtis apparently stated that he was going to "wait and see what happened" (R-43). However, Curtis subsequently did attempt to call two attorneys, as discussed previously. The second statement relied upon as a waiver by the trial court occurred when Curtis was taken to another room where a second officer continued to talk to him about the case and the other suspects. This second officer testified that when he asked Curtis if he was going to call an attorney, Curtis responded that he was going to "play it by ear" (R-130).

These ambiguous statements are clearly insufficient to meet the strict test for a waiver of an important constitutional right. Because the right to assistance of counsel is a fundamental

constitutional right, the Court must indulge in every reasonable presumption that Curtis did not waive the right, and the Court cannot presume acquiescence in the loss of the right. Johnson v. Zerbst, supra, 304 U.S. at 464. The State bears the burden of establishing a valid waiver, Brewer v. Williams, 430 U.S. 387, 404 (1964), and any doubt must be resolved in favor of protecting the claim. Michigan v. Jackson, 106 S. Ct. 1404, 1409 (1986).

A waiver is an intentional relinquishment or abandonment of a known right or privilege. Johnson v. Zerbst, supra. Under the facts of the present case, it is apparent that Curtis did not intentionally relinquish his right to assistance of counsel. As the Appellate Court

of Illinois noted, Curtis had no previous convictions and had no history of serious criminality. Under the circumstances in which he found himself, Curtis did not know that the police could not demand that he appear at the lineup without assistance of counsel. Nothing in Curtis's background, experience, or conduct evidenced an awareness of the knowledge of his right to counsel in a real sense. See 304 U.S. at 464. Moreover, the ambiguous nature of Curtis's statements falls far short of the clear, unambiguous statements necessary to satisfy the requirement of this Court for a voluntary waiver.

In addition, any claim of waiver is ineffective because of the fact that the conversations on which the trial court

relied to find a waiver took place after Curtis had already told the police that he did not want to talk until after he had seen a lawyer. Once Curtis asserted his right to counsel, the police were obligated not to initiate any conversation with him until he had had a reasonable time to contact his attorney, or until he was furnished with substitute counsel. Under the rule of Edwards v. Arizona, 451 U.S. 477, 484-85 (1981), once a suspect in custody asserts his right to counsel, he is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. Last term, the Court clarified the fact that

the Edwards rule applies not simply to the right to counsel arising out of the fifth amendment protection against compelled self-incrimination, but also to the sixth amendment guarantee of the ass stance of counsel. Michigan v. Jackson, supra. Therefore, the direct holding of Edwards that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated interrogation, applies equally to the present case.

3. The Admission At Trial Of Evidence Regarding The Lineup Identification Of The Petitioner Was A Per

Se Violation Of The Petitioner's Sixth Amendment Rights.

Under the long-established precedent of this Court, testimony regarding an identification made at an uncounseled lineup must be excluded at trial: "Only a per se exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." Gilbert v. California, 388 U.S. 263, 273 (1967); United States v. Wade, supra. Thus, it was clearly constitutional error for the trial court to admit into evidence testimony regarding Buckle's identification of Curtis at the lineup.

B. The Petitioner's Right To Counsel Was Violated By The Admission Of An Identification Made From Photographs Of The Unconstitutional Lineups.

Under the exclusionary rule of Gilbert v. California, supra, testimony which is the direct result of the illegal lineup "come at by exploitation of [the primary] illegality" is to be excluded on a per se basis. 388 U.S. at 272-73 (quoting Wong Sun v. United States, 371 U.S. 471, 488 (1963)). In the present case, the Illinois Supreme Court reversed the appellate court's ruling that the testimony concerning the identification of Curtis by Harris from photographs of the uncounseled lineup was inadmissable. Clearly, the Illinois Supreme Court's

determination was contrary to the spirit and substance of this Court's per se exclusionary rule as set forth in Gilbert.

At trial, the prosecutor showed Harris the lineup photographs and elicited testimony from her that she had seen the lineup photographs on February 23, 1981, and identified the defendants at that time from the photographs. The photographs were then admitted into evidence. As the appellate court found, this testimony and evidence were plainly the direct results of the unconstitutional lineups, obtained by the prosecutor's exploitation of the primary illegality. As such, they should have been excluded per se as "tainted fruit of the poisoned tree." The rationale of the per se rule

of Gilbert, a "sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup," 388 U.S. at 272-73, is equally applicable to testimony regarding the fruits of an unconstitutional lineup as well as the lineup itself.

Moreover, the facts of the present case demonstrate why a per se rule should be applied to the fruits of an unconstitutional lineup to prevent the compounding of the constitutional error. In this case, Harris knew before she viewed the photographs of the lineup that Curtis had been arrested for the crime, for she had seen his photograph in the paper. At the time she viewed the lineup photographs, therefore, it was obvious to her that a

lineup had previously occurred (since the photographs were in front of her), and that someone had identified Curtis at the lineup as a participant in the robbery. The suggestiveness of this situation is obvious. What makes this suggestiveness unconstitutional is the fact that Curtis was compelled to stand in a lineup without the assistance of counsel, and thus had no protection against the irregularities condemned in Wade and Gilbert which could have led to an unreliable lineup identification by Buckle. See United States v. Wade, supra, 388 U.S. at 229, 235-36. In essence, then, Harris was clearly influenced by an unconstitutionally obtained identification in a manner which makes her identification as in-

herently unreliable as an uncounseled lineup identification.

It should be noted that this case is clearly distinguished from United States v. Ash, 413 U.S. 300 (1973), in which the Court ruled that an accused did not have the right to have counsel present at a postindictment photographic display. In Ash, unlike the present case, there was no concern regarding the fruit of an unconstitutional corporeal lineup, and the issue was simply the validity of a photographic identification in the absence of counsel. The Illinois Supreme Court thus erred in failing to see a distinction between the photographic identification in this case and the one in Ash.

C. The In-Court Identifications Of The Petitioner Violated The Sixth Amendment Because They Were Without A Sufficient Independent Basis.

Under the rule of United States v. Wade, supra, it is constitutional error to admit in-court identifications which are tainted by unconstitutional lineup identifications. As the Court noted in Wade, "[a] rule limited solely to the exclusion of testimony concerning identification at the lineup itself, without regard to admissibility of the courtroom identification, would render the right to counsel an empty one." 388 U.S. at 240. The various factors discussed in Wade and subsequent identification cases as bearing on whether an in-court identification is sufficiently independent of the lineup

identification or, instead, is the fruit of the unconstitutional lineup, weigh heavily in Curtis's favor in the present case, especially when considered cumulatively.

With regard to Buckle's in-court identification, it should have been suppressed because it was inextricably linked to his lineup identification. At trial, the prosecutor opportunistically elicited testimony from Buckle that he had identified Curtis at the lineup, and thus this error obviously tainted any in-court identification. Moreover, there was an insufficient basis for the in-court identification absent the lineup, because Buckle had only seen the robbers briefly more than four years prior to trial. Buckle was unable to make a posi-

tive identification of Curtis prior to the lineup, see United States v. Wade, supra, 388 U.S. at 241, and the lineup was held nineteen months after the robbery. Such a delay is a "serious negative factor" in the Court's determination regarding the validity of in-court identification. See Neil v. Biggers, 409 U.S. 188, 201 (1972) (lapse of seven months).

Similarly, the in-court identification by Harris was also inextricably linked with the illegal lineup, because she testified regarding the lineup photograph and the photograph was admitted into evidence. As with Buckle, there was a nineteen-month lapse between the event and her photographic identification, and she had only caught a glimpse of the

robbers because she had been forced to keep her back to them during the robbery. At the viewing of the earlier photographic array Harris was unable to make a positive identification. It seems indisputable that the in-court identification by Harris was fully dependent on her earlier identification arising out of the illegal lineup. Consequently, the admission of the in-court identification by both Buckle and Harris was improper underthe rules established in United States v. Wade, supra.

D. The Trial Court's Errors Were Not Harmless Errors.

Because of the trial court's erroneous determinations as to Curtis's right to counsel at the lineup at which

he was identified by Buckle, it reached its determination of guilt by considering clearly unconstitutionally obtained evidence. It considered not only the lineup identification, but also all of the other fruits of the lineup, including the testimony of Harris regarding the lineup photograph and the in-court testimony of Buckle and Harris. This was clearly harmful error, for the only valid identification testimony came from Kennie, whose testimony was seriously suspect. As the Appellate Court of Illinois found, his history of criminality, his agreement to testify in exchange for a promise of leniency in sentencing on other charges pending against him, and his admitted grudge against Ryder, who was investigating Kennie in his role as a captain in

the Chicago Fire Department, all combined to completely undermine his credibility. Therefore, the case in fact hinged on the weight that was given to the identification made by Buckle and Harris.

Under the test for harmless error, the state must prove beyond a reasonable doubt that the evidence complained of did not contribute to the conviction. Chapman v. California, 386 U.S. 18, 23-24 (1967). An error in admitting plainly relevant evidence which possibly influenced the fact-finder adversely to a litigant cannot be conceived of as harmless. Id. at 23. Under the present circumstances, it is likely that the trial court's determination regarding guilt would have been different had it not considered the testimony related to

the illegal lineup and instead had to rely on the dubious testimony provided by Kennie. Moreover, even if it is assumed for the sake of argument that the Illinois Supreme Court correctly ruled that Harris's photographic identification testimony was valid, it is nevertheless still likely that the erroneously admitted lineup testimony influenced the judgment of the court. In light of this Court's determination that lineup identifications are more accurate than identifications from photographs, Simmons v. United States, 390 U.S. 377, 386 n.6 (1968), and therefore more probative than photographic identifications, it is very likely that the trial court's deliberations were heavily influenced by the unconstitutional and improperly admitted

lineup testimony, even if it is assumed that there was valid photographic identification from Harris. In short, it is simply not possible to support the Illinois Supreme Court's finding that the illegal lineup testimony made no contribution to the conviction of Curtis. Thus, the failure to exclude such evidence was harmful error requiring the reversal of Curtis's conviction.

CONCLUSION

For the foregoing reasons, the petitioner, James Curtis, respectfully requests this Court to grant this petition and issue a writ of certiorari to the Supreme Court of Illinois.

Respectfully submitted,

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